

**JON D. ANDERSON**  
Claimant

**KANSASLAND TIRE**  
Respondent

**ST. PAUL FIRE & MARINE INSURANCE COMPANY )**  
Insurance Carrier )

## ORDER

## ISSUES

Claimant argues he established through his testimony that he injured his left shoulder on March 10, 1999, while employed by the respondent. Further, claimant contends he gave respondent timely notice of the accident.

The respondent urges the Appeals Board to affirm the Administrative Law Judge's preliminary hearing Order. Respondent contends claimant failed to prove his left shoulder was injured at work and failed to provide respondent with timely notice of the accident.

After reviewing the preliminary hearing record, and considering the briefs of the parties, the Appeals Board finds as follows:

Claimant contends he injured his left shoulder while he was stacking boxes of tread rubber above his head while employed by the respondent on March 10, 1999. Then two or three days following this lifting incident, claimant testified he told respondent's plant manager, Michael Walker, his left shoulder was sore. But claimant admits he did not notify Mr. Walker that his left shoulder soreness was related to his work until March 26, 1999. Mr. Walker then completed an accident report.

Claimant had dislocated his left shoulder approximately five years before the March 10, 1999, alleged incident at work. But claimant testified he had no further problems with the left shoulder until the lifting incident at work on March 10, 1999.

After approximately a week following the lifting incident, claimant testified he sought medical treatment for his left shoulder at a local hospital's emergency room. The emergency room record admitted into evidence, however, indicates that claimant was at the emergency room on March 10, 1999, the same day he alleged he hurt the shoulder at work. Claimant also testified he gave a history, at the time he went to the emergency room, of injuring his left shoulder at work.

Claimant then went for further treatment on his own to the Wichita Clinic, where he was seen by John D. Osland, M.D., on March 17, 1999. Dr. Osland's medical records were admitted into evidence at the preliminary hearing. Claimant also testified he gave a history to Dr. Osland that he injured his left shoulder at work. After a March 22, 1999, MRI examination, Dr. Osland diagnosed claimant with a left rotator cuff tear and recommended surgery.

Respondent's insurance company then referred claimant for a second opinion to occupational medicine physician, Ronald Davis, M.D. This referral took place after claimant notified Mr. Walker on March 26, 1999, that he had injured his left shoulder at work. Dr. Davis first saw claimant on April 1, 1999, and placed claimant into a physical therapy program. He placed restrictions on claimant's left arm activities of minimal overhead work. Dr. Davis' medical records, admitted into evidence at the preliminary hearing, showed that he last treated claimant on April 21, 1999.

As noted by the Administrative Law Judge, at the completion of the preliminary hearing, the critical issue is the credibility of the claimant's testimony. First, he claims he had no further problems with his left shoulder after he dislocated the shoulder some five years before the March 10, 1999, lifting incident at work. But the respondent's plant manager testified claimant started working for respondent on June 27, 1998, and approximately one month after that date, he learned from the claimant that he was still having left shoulder problems as a result of a prior dislocation. Also, a medical record from the Wichita Clinic dated March 5, 1999, was admitted into evidence. At that time claimant was seeking treatment for left shoulder complaints. Claimant was seen by Thomas J. Peters, M.D., and claimant gave Dr. Peters a history that he had dislocated his left shoulder five years before and had continued problems with the shoulder since the

dislocation. Second, both the initial history that claimant gave to the hospital emergency room and to Dr. Osland specifically noted that claimant dislocated his shoulder five years before and there was presently no injury or no new injury. Third, claimant first testified that he realized he injured his shoulder lifting at work on March 10, 1999, because the left shoulder was sore the next day. He later testified that he did not know the left shoulder was related to the lifting incident at work until after a MRI examination and Dr. Osland indicated he believed claimant had injured his shoulder at work. That was also the reason claimant, on March 26, 1999, notified respondent's plant manager his left shoulder was work-related.

Because claimant's testimony conflicts with the medical records admitted into evidence and respondent's plant manager's testimony, the Appeals Board finds that the Administrative Law Judge's preliminary hearing Order should be affirmed. At this point in the proceedings, the Appeals Board concludes that the more plausible explanation for claimant's left shoulder problems is not related to a lifting incident at work, but is a continuing problem claimant has had since he dislocated his shoulder some five years before March 10, 1999. Additionally, claimant admits he did not notify respondent of the alleged March 10, 1999, work-related accident until March 26, 1999. Therefore, claimant failed to give respondent notice of the accident within ten days and there is no evidence of just cause for failure to give the ten-day notice<sup>1</sup>.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Administrative Law Judge Jon L. Frobish's preliminary hearing Order dated July 1, 1999, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 1999.

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BOARD MEMBER

c: Randy S. Stalcup, Wichita, KS  
Kristine A. Purvis, Overland Park, KS  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Director

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<sup>1</sup>See K.S.A. 44-520.